Supreme Court, U.S.
FILED
DEC 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

—against—

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. MCCONN, D.J. MACIVER, JR., L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, AND J.R. HUBBARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Did the courts below err in refusing to create a federal remedy under the tender offer antifraud provision of the federal securities laws for an alleged breach of contract, particularly where:

(a) the statute in question does not, in its terms, create a federal breach of contract remedy;

(b) there is no claim that any person was deceived or misled in any way;

(c) there is no claim of any attempt to artificially affect the market price of any stock; and,

(d) the matters complained of here have traditionally been relegated to state law and indeed are presently the subject of state court proceedings?

THE PARTIES

The parties before this Court are those set forth in the caption, except M.R. Engler, Jr., W.C. Henderson, M.A. Ehrlick, A.M. Derrick, Richard L. McConn, D.J. MacIver, Jr., and L.M. Varen Kamp who were voluntarily dismissed in the trial court, but were inadvertently included in the caption by petitioner. Petitioner agrees that such individuals are not parties to this appeal and that their names should be deleted from the caption.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

STATUTE INVOLVED

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(e):

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material

fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

STATEMENT OF THE CASE

This is a claim, as characterized by petitioner, for the allegedly "wrongful termination" of a tender offer.[1] Petitioner seeks to transform this state law breach of contract claim into a cause of action for "fraud" under the federal securities laws, although it is not contended that shareholders were deceived or misled in any way.[2]

A. Burlington's Acquisition of El Paso

On December 21, 1982, Burlington Northern, Inc. ("Burlington"), through a wholly-owned subsidiary, commenced a tender offer for 25.1 million shares of The El Paso Co. ("El Paso") at $24 per share, a substantial premium over the market price of El Paso stock. JA 93. As is customary, Burlington's offer unambiguously provided that if any one of certain specified events occurred, Burlington was entitled to terminate the offer. These events included, among others, litigation seeking to prevent the offer, governmental action directed at the offer, a threatened sale of assets by the target company, issuance of new

[1] Petitioner's Brief at 5, hereinafter referred to as "PB—."

[2] The complaint alleges:

> The improper termination and withdrawal of the tender offer constituted a willful breach of the tender offer agreements.

Joint Appendix at 13 (hereinafter referred to as "JA—").

stock by the target company, changes in the target company's by-laws, or an agreement on a business combination between the offeror and the target company. JA 159-170. There is no factual dispute that a number of these specified events took place, so that the terms of the offer permitted its termination. JA 25-26, 198-213.[3]

El Paso management had initially opposed the offer, and advised its shareholders not to tender their shares. Management believed the price was too low. JA 198. El Paso had also objected to the fact that, if Burlington were to gain majority control of El Paso in the tender offer, there would be no protection against a subsequent merger in which the remaining El Paso shares would be acquired at a price dictated by Burlington. JA 202-204. El Paso also took a number of measures directed at the offer, including, among other things, the institution of litigation seeking to enjoin the offer, the issuance of a new class of preferred stock intended to limit Burlington's voting rights in El Paso, and the announcement of negotiations for the sale of certain of the company's most significant assets. JA 198-213.

When no "white knight" emerged to offer a higher price for El Paso's shares, El Paso and Burlington entered into negotiations which, as is often the case in these matters, ultimately resulted in the combination of the companies. On January 10, 1983,[4] the two companies entered into an agree-

[3] In *Gilbert & Steiner v. Burlington Northern, Inc.*, C.A. Nos. 7075 and 7079 (Del. Ch. Nov. 27, 1984), a decision rendered after the filing of petitioner's brief, the Delaware Court of Chancery, *inter alia*, granted summary judgment to Burlington on the state law breach of contract claim brought by El Paso's shareholders. (A copy of this decision is appended hereto at A-1.) Previously, the Delaware federal court had similarly concluded, in another action brought by El Paso shareholders, that "[b]ecause the December offer contained a number of conditions, some of which occurred, the December offer could have been terminated and withdrawn anytime . . . prior to acceptance by Burlington for payment." *Brill v. Burlington Northern, Inc.*, 590 F. Supp. 893, 898 (D. Del. 1984).

[4] At that time, El Paso shareholders who had tendered their shares still had two more days in which they could withdraw these tenders, and presumably would have done so if a higher bid had been made. JA 60, 78-82. Petitioner's statement that Burlington "held majority control" of El Paso at the time is simply wrong. PB 6.

ment which provided, *inter alia*, that (i) Burlington would terminate the December offer in accordance with the offer's previously disclosed terms, (ii) Burlington would purchase 4,166,667 shares from El Paso at $24 per share, representing an infusion of $100 million of capital into El Paso, (iii) Burlington would commence a new offer for 21 million shares at $24 per share, (iv) Burlington would not acquire the remaining shares of El Paso unless any such transaction was approved by El Paso directors who were not designated by Burlington and by an affirmative vote of the El Paso shareholders other than Burlington, (v) El Paso would rescind its issuance of preferred stock and a by-law relating to shareholder consents, (vi) all litigation between the parties would be terminated, and (vii) Burlington would receive an option to purchase 4,950,000 El Paso shares (about 8% of the company's shares) at $24 per share. JA 234-236.

The agreement was beneficial to Burlington, El Paso and El Paso's shareholders. Burlington was freed from the threat of an injunction against the offer, the dilution of its voting rights, and the possible sale of critical El Paso assets. El Paso and its shareholders received $100 million in needed equity capital, and important protections regarding any ultimate merger transaction.[5] *All* El Paso shareholders, including those holding over 25 million shares which were not tendered pursuant to the first offer, were given the opportunity to consider and participate in Burlington's second offer. Many shareholders had not tendered their shares, upon management's recommendation, in the hope that a higher competing offer could be found. They were no longer able to tender their shares pursuant to the first offer because the proration period had expired.[6] When El Paso

[5] In fact, Burlington acquired the remaining El Paso shares later in 1983, in a transaction which was approved in accordance with the procedures mandated by the agreement between Burlington and El Paso, and in which shareholders received consideration equal in value to the price paid in the tender offer.

[6] Under the terms of the first offer, if the offer was oversubscribed, all those who tendered stock within the first ten days of the offer would have a prorated portion of their shares accepted and shareholders who subsequently tendered would not have their shares purchased. This cannot happen under present SEC rules, which require proration to extend throughout the duration of an offer. *See*, 17 C.F.R. § 240.14d-8. This means that all shares tendered throughout the duration of the offer must now be purchased on a pro rata basis.

management was unable to find a higher offer, it bargained for the right to permit all shareholders to consider the only offer then available.

On January 11, 1983, Burlington commenced its second, or January, tender offer for El Paso shares. JA 12, 27. This offer provided, in accordance with the Williams Act, that any tendered shares could be withdrawn prior to January 31, 1983, and that Burlington could not purchase any shares until February 8, 1983. Thus, a competing offer for El Paso stock could have been made during these new periods. No such offer eventuated, and on February 8, 1983, after more than 40 million shares had been tendered, Burlington accepted, on a pro rata basis, 21 million shares for payment. JA 27.

It is this conduct, all of which was fully disclosed to El Paso shareholders, that is claimed to be a "fraud" under the federal securities laws. There is no claim that El Paso shareholders were misled or deceived in any way, or that there was any attempt to artificially affect the market for El Paso stock. There is no claim that there was any available higher offer that was thwarted by the agreement. The ultimate result was that, pursuant to an agreement between Burlington and El Paso, Burlington acquired El Paso at an acquisition price which represented a substantial premium to El Paso shareholders.

B. The District Court's Opinion

This action purports to arise under section 14(e) of the Securities Exchange Act of 1934 (the "1934 Act"), an antifraud provision relating to tender offers added to the 1934 Act by the Williams Act. The district court dismissed the complaint, holding that it did not allege conduct constituting manipulation under this provision. It held that to state such a claim, the alleged manipulative activity "must *artificially affect* the marketplace *and* do so in a misleading or deceptive manner." (Emphasis in original.) JA 37. In the present case, however, "[a]ll activity of the defendants that could have conceivably affected the price of the El Paso shares was done openly." JA 40.

The court reasoned that if conduct of the nature involved in this case constituted manipulation, "then potential offerors and management of target companies would be subject to liability every time a tender offer is revised or negotiated." JA 40. The Court concluded that because "there was no deception practiced upon the shareholders in terminating their alleged contractual rights, there was no manipulative violation within the meaning of Section 14(e). . . ." JA 43.

C. The Court of Appeals' Opinion

The Court of Appeals for the Third Circuit affirmed. It concluded that "§ 14(e) was not intended to create a federal cause of action for all harms suffered because of the proffering or the withdrawal of tender offers." JA 56. Rather, "Section 14(e) was enacted principally as a disclosure statute, designed to insure that fully-informed investors could intelligently decide how to respond to a tender offer." JA 56.

The court held that the more "open-ended notion of manipulative acts," suggested by *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982), would "transform all decisions by bidders or by target management that affect a tender offer contest into 'artificial influences,'" and concluded that "[a]bsent a requirement of deception, the Williams Act would mandate that the federal courts supervise the substantive fairness of practically all tender offers." JA 57-58.

SUMMARY OF ARGUMENT

This Court has comprehensively reviewed the 1934 Act, the Williams Act amendments to that Act and their complementary antifraud provisions (sections 10(b) and 14(e)).[7] This review leads ineluctably to the conclusion that these antifraud provisions cover only conduct which is deceptive in nature and do not apply where the claim is, in essence, one of breach of contract or violation of fiduciary duties. In *Ernst &*

[7] 15 U.S.C. §§ 78j(b), 78n(e) (1981).

Ernst v. Hochfelder[8] and *Santa Fe Industries, Inc. v. Green*,[9] the Court described the 1934 Act as principally intended to protect investors through a philosophy of full disclosure. Manipulation was defined as a term of art requiring intentional or willful conduct designed to mislead investors by creating a false impression of market activity. In the latter case, this Court held that the antifraud provisions of section 10(b) were inapplicable once full and fair disclosure had occurred.

In *Rondeau v. Mosinee Paper Corp.*[10] and *Piper v. Chris-Craft Industries, Inc.*,[11] the Court dealt specifically with the Williams Act amendments to the 1934 Act. It held that the Williams Act was solely a disclosure statute enacted to remedy a gap in the 1934 Act by extending the coverage of the Act to cash tender offers. Recognizing Congress' explicit intent, the Court refused, in *Rondeau*, to permit injunctive relief absent proof of traditionally required predicates, and in *Piper*, to imply a private right of action for damages in favor of an offeror. In each case the plaintiff failed to show that implication or extension of a Williams Act cause of action was evidenced by congressional intent or necessary to effectuate the purposes of the Act.

As in *Rondeau* and *Piper*, petitioner's efforts to create a § 14(e) cause of action for the alleged breach of a tender offer contract must be similarly unavailing. Petitioner's interpretation of § 14(e) finds no support in legislative history and would constitute a serious departure from this Court's long-standing construction of the 1934 Act. Likewise, the contention that manipulation may be found absent nondisclosure or the intent to mislead investors directly contradicts the Court's statements in *Hochfelder, Santa Fe* and *Piper*, and the recent conclusions of seven courts of appeals.[12]

Petitioner claims that the use of the word "fraud" in § 14(e) proves that every kind of wrongdoing is comprehended by the Williams Act amendments. This view is without any support. It ignores the fact that § 14(e) was meant only to fill the gap in the antifraud coverage already provided by other sections of the 1934 Act, and not to substantively broaden the

[8] 425 U.S. 185 (1976).
[9] 430 U.S. 462 (1977).
[10] 422 U.S. 49 (1975).
[11] 430 U.S. 1 (1977).
[12] *See* discussion *infra* n. 22.

scope or concept of federal regulation. It ignores the plain meaning of fraud under both the securities laws and generally, a meaning rooted in the concepts of deception, misrepresentation and trickery. And it ignores that Congress intended to provide the same regulatory framework for tender offers as was already in existence for proxy contests, in which federal law mandates and regulates disclosure, and state law continues to regulate matters of corporate governance.

State law has traditionally provided remedies for breach of contract, violation of fiduciary duties, self-dealing, and similar matters, and has done so when such conduct occurs in the context of a tender offer or other contest for corporate control.[13] Congress has shown no intention to displace state law in these areas, or to create a federal common law of contract or fiduciary duty, and has provided no standards that could possibly delimit any such causes of action. For the courts to set these standards would be to assume a legislative function that this Court has continually warned against. Congress is presently considering various proposals for significant amendments to the Williams Act, and will have the opportunity to specify the conduct that it wishes to regulate.

The case at bar is surely not the vehicle to expand § 14(e), even assuming that such an expansion was thought to be a wise one. The alleged violation — a supposed "wrongful termination" of a tender offer — would not amount to fraud or manipulation under any definition. This case does not involve an intentional manipulation of the market for or price of securities. It does not involve devices intended to assure that a tender offer would not succeed. It does not involve a distortion of the balance of power between a target and a bidder. The claim, rather, is for breach of contract, a state law claim under any standard. The decisions below were clearly correct and should not be disturbed.

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[13] Indeed, in the present case, the Delaware Chancery Court is considering, under the appropriate state-law standards, the same claims petitioner is presenting here, and has already ruled that there was no breach of the tender offer contract. *Gilbert & Steiner v. Burlington Northern, Inc., supra* n. 3.

ARGUMENT

POINT I

THE WILLIAMS ACT DOES NOT CREATE A FEDERAL REMEDY FOR ALLEGED BREACHES OF CONTRACT

A. The plain language of the statute bars the petitioner's federal claims.

Petitioner's claim that section 14(e) of the 1934 Act somehow authorizes the federal courts to supplant traditional state law remedies for breaches of contract (and to create new federal remedies therefor) finds no support in the language of the statute.[14] Nowhere in that section or any section of the Act did Congress articulate any federal interest in, or remedy for, an alleged breach of contract, and no court has ever held such an interest, or remedy, to exist.

While section 14(e) *does* make it "unlawful" for any person to engage in "fraudulent, deceptive or manipulative acts or practices in connection with any tender offer," it *does not*, by its terms, federalize actions, such as this one, which complain of nothing more than a simple breach of contract.[15] As we will show, under principles well established by this Court, an alleged breach of contract is neither fraudulent, nor deceptive,

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[14] It is axiomatic that in construing the meaning of a statute, the starting point in the analysis is the language of the statute itself. As the Court explained, it is assumed "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[15] The SEC, which is mandated by the statute to "define . . . such acts and practices as are fraudulent, deceptive, or manipulative," has never suggested that an alleged breach of a tender offer contract falls within any of these categories. 15 U.S.C. § 78n(e).

nor manipulative. In the absence of statutory ambiguities, this Court should decline Petitioner's invitation to extend the statute far beyond its plain language.

B. The decision below properly applies the teachings of this Court.

Even if it were assumed, *arguendo,* that further analysis were necessary, this Court's well-established precedents under both the Williams Act amendments and section 10(b) of the 1934 Act — the statute upon which section 14(e) was largely patterned and molded — demonstrate that an alleged breach of contract does not state a federal claim under the securities laws.

The Court has made it clear that fraud and manipulation under the federal securities laws require deception or the misleading of investors. It has made it clear that the Williams Act amendments to the 1934 Act were intended to extend the disclosure requirements and protections of that Act to tender offers, and not to enlarge the substantive scope of federal regulation. And the Court has made it clear that Congress did not intend by the federal securities laws to supplant traditional state common law.

There are four decisions of this Court — two dealing specifically with the Williams Act, and two with the similar provisions of section 10(b) — in which these fundamental principles are developed.

In *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975), this Court stated that the purpose of the Williams Act "is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party." 422 U.S. at 58.[16] The Court

[16] The Court, citing legislative history, also noted that in "requiring disclosure of information," Congress had taken care " 'to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.' " *Id.* at 58-59. This was done by putting disclosure obligations on both the offeror and target company management, and also by establishing a procedural framework — relating to such factors as the withdrawal of tendered shares and proration rights — within which the disclosure mandated by the Act was to function.

observed that a private cause of action under the Williams Act "is not expressly authorized by the statute or its legislative history." *Id.* at 62. Thus, courts are not free to create sweeping rights or remedies, bounded only by judicial notions of where the "public interest" might lie. *Id.* Rather, the boundaries of the claim, if one is to be implied at all, are to be carefully limited and circumscribed.

In *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976), the Court, while not dealing directly with § 14(e) or the Williams Act amendments, said much about the antifraud provisions of the 1934 Act and particularly about the concept, central to the present case, of "manipulation" under this statute. It held that *scienter* was required to maintain a claim under section 10(b) and Rule 10b-5, provisions which, taken together, contain the identical language of fraud, deception and manipulation as § 14(e), and are generally considered to be the models for that section.[17] It emphasized as "especially significant," the use of

[17] Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

the word "manipulative," since this "is and was virtually a term of art when used in connection with securities markets. *It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.*" *Id.* at 199 (emphasis added).

In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), the Court dealt directly, and extensively, with the Williams Act itself.[18] The precise issue presented was whether there was an implied cause of action for damages for a tender *offeror* under section 14(e). In deciding this question, the Court exhaustively reviewed the legislative history of the Williams Act and the policies underlying it. The Court observed that the Williams Act amendments to the 1934 Act had been enacted because the advent of tender offers had "removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws." *Id.* at 22. It was to remedy this gap in federal disclosure requirements, and not to create a "pervasive scheme of federal regulation of tender offers," that the amendments had been proposed. *Id.* at 29.[19]

The Court, in its review of legislative history, pointed out over and again that the Williams Act was essentially a disclosure statute. It observed that "the bill as finally enacted by Congress was styled as a disclosure provision: 'A bill to provide for full disclosure of corporate equity ownership of securities under the Securities Exchange Act of 1934.' " *Id.* at 27. It noted that the sponsors "made it clear that the legislation was designed solely to get needed information to the investor." *Id.* at 30-31.

In reaching its conclusion the Court dealt specifically with the claim that the Act was intended generally to regulate "unfair tactics by entrenched management." References in the legislative history to such conduct merely meant to impose

[18] Curiously, *Piper* is cited only once in petitioner's brief (PB 25) and *Rondeau* is not cited at all.

[19] The Court noted that in addition to disclosure requirements, the Williams Act provided "other benefits for target shareholders" such as proration and withdrawal rights. *Id.* at 23. But these are in the nature of procedural or structural ground rules, similar to those imposed by stock exchanges, and do not deal with the type of substantive conduct traditionally regulated by state law. *See id.* at 23 n. 17.

"disclosure duties upon management" as well as the offeror; by "extending the statute's coverage to solicitations in opposition to tender offers," it was recognized that "full disclosure by all contestants was needed to protect shareholders." *Id.* at 34.

The Court held that the implication of a cause of action under the statute was only proper if "necessary to effectuate Congress' goals." *Id.* at 26. And in dealing with a separate claim under Rule 10b-6, promulgated under the 1934 Act, the Court described that Rule as "an antimanipulative provision," directed at "market tampering" by an issuer of securities "in order to create an unnatural and unwarranted appearance of market activity." *Id.* at 43. Again, the definition of "manipulation" was identical to that in *Hochfelder*, and to that used by the lower courts in the present case.

Two months later, the Court decided *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), and the themes were the same. The Court pointed out that it had "repeatedly" described the "fundamental purpose" of the 1934 Act "as implementing a 'philosophy of full disclosure;' once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute." 430 U.S. at 478. The Court said that it was "reluctant" to recognize a cause of action "to serve a subsidiary purpose" other than the fundamental purpose of full disclosure. *Id.*

The Court said that if the conduct alleged in the complaint before it — basically, breach of fiduciary obligations owed to minority shareholders by a freeze-out merger at an unfair price — was considered to be a Rule 10b-5 fraud, the "result would be to bring within the Rule a wide variety of corporate conduct traditionally left to state regulation." *Id.* Moreover, if the concept of "fraud" were to be so extended, there would be no rational way to distinguish between the conduct alleged in the complaint before the Court, and "other types of fiduciary self-dealing involving transactions in securities." *Id.*

The Court went on to point out that any such "extension of the federal securities laws would overlap and could possibly interfere with state corporate law." *Id.* at 479. It concluded that

> [a]bsent a clear indication of Congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.

Id.

The Court also dealt again, as in *Hochfelder* and *Piper,* with the concept of manipulation under the federal securities laws and again reached the same conclusion. The Court held that "manipulation," as "virtually a term of art when used in connection with securities markets, . . . refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Id.* at 476. It found that "manipulative" had been used by Congress "in this technical sense," and concluded that Congress would not have chosen this "term of art" if it had intended to cover instances "in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary." *Id.* at 477.

These four cases necessarily set the framework in which this case must be viewed.[20] And the principles they establish, taken singly or together, make it evident that the present breach of contract complaint does not state a federal claim. Thus, it is clear that:

1. The antifraud provisions of the federal securities laws cover only conduct which is deceptive in nature, and

[20] *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), dealt with the Williams Act, but is not singularly pertinent to the issues now before the Court. That case dealt with the constitutionality of state statutory provisions which conflicted with the procedural framework for tender offers previously established by the Williams Act. There is no claim here that any state corporate law, contract or fiduciary principles are inconsistent with any provisions of the Williams Act. Indeed, to the extent that *MITE* is relevant here, it reaffirms the principles articulated in the earlier cases, for the Court reiterated that the Williams Act was intended to fill the "regulatory gap" in the 1934 Act by extending federal disclosure regulations to tender offers. *Id.* at 632.

do not cover conduct where the claim is, in essence, one of breach of fiduciary duties, mismanagement, or breach of contract.

2. "Manipulation" under the federal securities laws means conduct "artificially affecting market activity in order to mislead investors." *Santa Fe,* 430 U.S. at 477.[21]

3. The Williams Act is "a disclosure mechanism" which "was designed solely to get needed information to the investor." *Piper,* 430 U.S. at 31, 39. It was enacted to extend to tender offers the federal disclosure regulations already in existence for other corporate control contests, such as proxy contests.

4. In the absence of the clearest evidence of congressional intent, the Court will not federalize the regulation of conduct that has traditionally been governed by state law, and will not create a federal law of corporate governance; and

5. Implicit private rights of action under the federal securities laws will be created, defined and extended only insofar as "necessary" to effectuate the clearly-expressed intent and goals of Congress.[22]

[21] A good example of manipulation in the tender offer context is found in *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied,* 400 U.S. 822 (1970). In that case, one of two contestants for control of a target company engaged in last minute transactions in the target company's securities designed to drive the price of these securities to a level higher than its rival's tender offer price. The court, in finding this practice to be manipulative, pointed out that its result "was to represent to the public . . . that there was a great demand for Air Brake at an increased value." This "inevitably distorted the market picture and deceived public investors," since its effect was "to create the appearance of an extraordinary demand for Air Brake stock and a dramatic rise in market price, as a result of which Air Brake shareholders were deterred from tendering to Crane." *Id.* at 792-793.

[22] The courts of appeals have also continually held that section 14(e) was not intended to regulate the substantive conduct of the

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Also pertinent here is the observation made in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), and reiterated in *Santa Fe*, 430 U.S. at 478-479, as to the potential

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participants in the tender offer process. In addition to the decision of the Third Circuit in the present case, *see also:*

Second Circuit: *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757, 760 (2d Cir.) *cert. denied*, 104 S. Ct. 550 (1983) (Williams Act "was designed solely to get needed information to the investor"; "Congress's ban on 'manipulative acts and practices' was directed only at rigged transactions that might mislead investors" in the making of investment decisions;

Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1, 4, 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1326 (1984) (stock option given to "white knight" for 200% of target company's stock not violative of section 14(e) even though it made it impossible for hostile offeror to gain control; section 14(e) did not authorize federal courts "to review the substantive validity of corporate actions undertaken during the course of a tender offer," since to do so would improperly impose "judge made substantive obligations" upon the participants in a tender offer contest);

Fourth Circuit: *Dan River, Inc. v. Icahn*, 701 F.2d 278, 288 (4th Cir. 1983) (sole purpose of section 14(e) is to insure adequate disclosure to shareholders; practice which creates uncertainty in a tender offer not manipulative since "[m]ost tender offers include conditions which make acceptance of the tender uncertain");

Fifth Circuit: *Gearhart Indus., Inc. v. Smith International, Inc.*, 741 F.2d 707, 724 (5th Cir. 1984) (issuance of securities making it more difficult for hostile offeror to succeed not violative of § 14(e) since there was no evidence of "any intent . . . to deceive, defraud, or mislead investors");

Seventh Circuit: *Panter v. Marshall Field & Co.*, 646 F.2d 271, 283 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (§ 14(e) "is intended to protect shareholders from making a tender offer decision on inaccurate or inadequate information");

Atchley v. Qonaar Corp., 704 F.2d 355, 359 (7th Cir. 1983) ("*Santa Fe* analysis is the same for claims under Section 14(e) as it was for claims under Section 10(b)");

Eighth Circuit: *Feldbaum v. Avon Products, Inc.*, 741 F.2d 234, 237 (8th Cir. 1984) (option for 25% of a company's shares given to potential merger partner not violative of section 14(e) since the "federal purpose is served once material facts are revealed so that the shareholder has enough information to make an intelligent decision");

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for abuse in this kind of litigation. As the *Blue Chip* Court found, "in this type of litigation . . . the mere existence of an unresolved lawsuit has settlement value to the plaintiff . . . because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial . . . ." *Id.* at 742-743.

This danger is well illustrated in the tender offer context by the aftermath of the Sixth Circuit's holding in *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982), that certain options given in a tender offer contest were manipulative devices under the Williams Act. Since that decision, almost every event that has taken place in a tender offer has been similarly challenged as a "manipulative device." While these actions have been uniformly unsuccessful, the vexatiousness and disruption are precisely what the *Blue Chip* Court had foreseen. Indeed, the burden on a single party, Burlington, which did nothing other than acquire a company at premium prices, is demonstrated by the shareholder litigation

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Ninth Circuit: *Pacific Realty Trust v. APC Investments, Inc.*, 685 F.2d 1083, 1086 (9th Cir. 1982) (manipulation limited to practices intended to mislead investors by artificially affecting market activity").

The one contrary decision is *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982), in which the Court of Appeals for the Sixth Circuit held that certain options granted to a favored white knight violated § 14(e). The most significant factor in that case was a "crown jewel" option given on the target company's most valuable asset, so that even if the hostile offeror decided to compete, that asset would no longer be available. In addition, the stock option granted in *Mobil* was at a price that was far below the white knight's tender offer price, so that any competing hostile offeror would have had to pay the white knight literally hundreds of millions of dollars in windfall profits. Recently, in *Biechele v. Cedar Point, Inc.*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,829 (6th Cir. November 8, 1984), the Sixth Circuit retreated from *Mobil;* the court found that, because of its "unusual" facts, *Mobil* "was not to be broadened and applied indiscriminately." *Id.* at 90,173. The conduct in question in *Biechele* was found not to be manipulative because it "would not inhibit third party bidders if they were otherwise interested" and did not artificially affect market activity in order to mislead investors. *Id.* at 90,175.

instituted with respect to this transaction.[23] If the Williams Act is meant to encourage tender offers, as petitioner suggests, it hardly furthers this purpose to subject an offeror which has already paid premium prices to acquire all of a company's stock to such a barrage of litigation. If tender offers are ultimately discouraged by a proliferation of claims of this nature, the interests of all shareholders will have been disserved and congressional policies subverted.

POINT II

THE ARGUMENTS MADE BY PETITIONER ARE CONTRARY TO THE CONTROLLING PRINCIPLES ESTABLISHED BY THIS COURT AND ARE CLEARLY WITHOUT MERIT

The principles expressed repeatedly by this Court are themselves a complete answer to the arguments made by Petitioner. But, at the risk of further repetition, we will treat Petitioner's arguments separately and explicitly, noting at the outset that there are no decisions from this Court or any court which support the transformation of a breach of contract action into a fraud claim under the federal securities laws.

A. The legislative history of the Williams Act evidences no congressional intent to create broad federal regulation of the substantive conduct of participants in tender offers.

The legislative history of the Williams Act was painstakingly analyzed by this Court in *Piper*, and, as we have noted,

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[23] In addition to the present case, *see Gilbert & Steiner v. Burlington Northern, Inc.*, Nos. 7075 and 7079 (Del. Ch., filed January 17, 1983) (claim that withdrawal of initial offer was a breach of contract dismissed on summary judgment; claim of breach of fiduciary duty pending); *Gelobter v. Petty*, No. 7087 (Del. Ch., filed January 31, 1983) (derivative claim alleging corporate waste and breach of fiduciary duty in connection with Burlington's tender offers dismissed); *Smachlo v. Birkelo*, 576 F. Supp. 1439 (D. Del. 1983) (derivative and class claims for breach of fiduciary duty and corporate waste in connection with Burlington's tender offers dismissed); *Brill v. Burlington Northern, Inc.*, 590 F. Supp. 893 (D. Del. 1984) (claims brought pursuant to §§ 14(d)(6), 14(d)(7), 14(e) and 20 of the Exchange Act dismissed).

the Court's conclusion as to the Act's purpose was clear. A brief review makes it evident that there was no contemplation of regulating conduct such as that involved in the present case.

Prior to 1968, the 1934 Act imposed extensive disclosure requirements on exchange offers and proxy statements, but did not provide for disclosure in connection with cash tender offers even though such offers involved similar investment decisions. S. Rep. No. 550, 90th Cong., 1st Sess. 3-4 (1967).[24] The Williams Act amendments were proposed in response to the increased use of cash tender offers in corporate acquisitions, a device that had removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws. *See generally*, S. Rep. No. 550, 90th Cong., 1st Sess., 2-4 (1967); H.R. Rep. No. 1711, 90th Cong., 2nd Sess., 2-4 (1968).

As described by their sponsor, the Williams Act amendments were intended to "close a significant gap in investor protection under the federal securities laws *by requiring the disclosure of pertinent information to stockholders* when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 Cong. Rec. 854 (1967) (emphasis added). Immediately prior to the passage of his bill by the Senate, Senator Williams explained:

> Today, the public shareholder in deciding whether to reject or accept a tender offer possesses limited information. No matter what he does, he acts without adequate knowledge to enable him to decide rationally what is the best course of action. This is precisely the dilemma which our securities laws are designed to prevent . . . . [*The bill*] *is designed solely to require full and fair disclosure for the benefit of investors* . . . .

113 Cong. Rec. 24664 (1967) (emphasis added).

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[24] This Court has repeatedly observed that the fundamental purpose of the 1934 Act is " 'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*. . . .' " *Santa Fe*, 430 U.S. at 477 *(quoting Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972), which was quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963)).

Senator Williams further observed:

> All have recognized the need to fill the existing gap in the disclosure pattern of our securities laws.
>
> The full disclosure principle was thought to be revolutionary when it was first introduced into the securities marketplace more than 30 years ago. Many predicted that it would hamper or even strangle the operations of our free enterprise system. The facts have proven otherwise. Full disclosure has given the investing public confidence in our free enterprise system. Following this premise, our Nation's securities markets have thrived and prospered over the years. *With this legislation, I am sure that we will eliminate one of the last remaining areas where full disclosure is necessary but not yet available.*

Id. at 24664-65 (emphasis added).[25]

The Williams Act was intended to do no more in the area of tender offer regulation than the other disclosure provisions in the 1934 Act had done in their respective fields, particularly that of proxy contests. Senator Williams explained:

> This legislation fills a gap which now exists in our securities laws dealing with full disclosure of corporate equity ownership. This one area has been overlooked until now — the area where ownership of companies is sought through what is called the cash-tender offer.

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[25] *See also,* the statement of Manuel Cohen, then Chairman of the SEC:

> "[T]he general approach of . . . this bill is to provide the investor, the person who is required to make a decision, an opportunity to examine and to assess the relevant facts. . . ."

S. Rep. No. 550, 90th Cong., 1st Sess., 15 (1967).

> What this bill would do is to provide the same kind of disclosure requirements which now exist, for example, in contests through proxies for controlling ownership in a company.

Id. at 24665. After further discussion, Senator Javits inquired about the scope of the proposed legislation.

> Mr. JAVITS. . . . One last question on this score: The Senator represents to the Senate, and I accept his representation fully, that this is analogous to the proxy rules, so that very much the same principles obtain as to . . . a takeover, as to a proxy fight by a group of stockholders.
>
> Mr. WILLIAMS. This legislation is patterned on the present law and the regulations which govern proxy contests.

Id.

There is no evidence whatever that any broad-scale regulation of substantive conduct was contemplated. As the *Piper* court found, neutrality regarding offerors and targets was only "one characteristic" of the Williams Act and evidenced no intention to enact "a pervasive scheme of federal regulation of tender offers." 430 U.S. at 29. Congress had in fact refused to enact any substantive restrictions on either the takeover bidder or incumbent management:

> The sponsors of this legislation were plainly sensitive to the suggestion that the measure would favor one side or the other in control contests; however, they made it clear that the legislation was designed solely to get needed information to the investor. . . .

Id. at 30-31.[26]

Petitioner offers nothing that in any way contradicts this record. There is not the slightest support for the idea, proffered without citation, that in "enacting Section 14(e), Congress sought to establish uniform and consistent standards for the resolution of tender offer disputes." PB 14. To the extent that fragmentary or generalized references are made to conduct not involving failure to disclose (see PB 31-32), they evidence no congressional intent to create the broadly gauged cause of action that Petitioner proposes. The references, rather, are to insider trading activities—a most traditional form of deceptive conduct—or to the procedural ground rules established as a framework in which the disclosure obligations placed on both sides were to operate. There is not a word to suggest that Congress intended to bring under the federal mantle the regulation of fiduciary obligations, contractual relationships, or other substantive conduct of the participants in tender offers.

B. The conduct alleged in the complaint does not constitute manipulation within the meaning of the securities laws.

The argument that the conduct alleged in the complaint constitutes manipulation, to the extent it is seriously pressed, cannot survive the three decisions of this Court holding that the *misleading of investors* is a prerequisite to any claim of manipulation under the federal securities laws. In the present case, the "wrong" alleged is the supposed breach of a tender offer contract, pursuant to a fully disclosed agreement, and no

[26] The "neutrality" contemplated by Congress was accomplished by imposing disclosure obligations on both sides, and by eliminating a previously proposed provision, now thought to unduly favor management, requiring advance notice of any tender offer. There is no indication that any substantive conduct was to be regulated or prohibited. *See* Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred*, 97 Harv. L. Rev. 1964, 1981-82 (1984).

investors were misled. This Court's dispositive statements on manipulation leave no room for argument.[27]

There is no conceivable way that the conduct alleged in the complaint can meet the test set forth in these cases. This case concerns a fully disclosed agreement whereby Burlington acquired El Paso, benefits were obtained by both parties, and all El Paso shareholders were given the opportunity to tender their shares at premium prices. No one sought to alter or affect the price of El Paso stock, to create the appearance of market activity or market demand that did not really exist, or to conceal any information from El Paso shareholders. Shareholders were fully informed of the conditions in the tender offer contract, which were invoked in accordance with their terms.[28] As the district court concluded, if this is manipulation, "then

[27] *Hochfelder* — Manipulation "is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." 425 U.S. at 199.

Piper — Manipulation is "market tampering" activity undertaken "in order to create an unnatural and unwarranted appearance of market activity." 430 U.S. at 43.

Santa Fe — Manipulation "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." 430 U.S. at 476.

See also, e.g., Billard v. Rockwell Int'l Corp., 526 F. Supp. 218, 222 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 51 (2d Cir. 1982) (manipulation refers to devices " 'used to persuade the public that activity in a security is the reflection of genuine demand instead of a mirage' "); *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1360 (N.D. Tex. 1979).

The law review article that appears to be a significant source for Petitioner's argument similarly concludes that "the current meaning of 'manipulative' under section 14(e) incorporates nondisclosure as an essential element." Junewicz, *The Appropriate Limits of Section 14(e) of the Securities Exchange Act of 1934*, 62 Tex. L. Rev. 1171, 1204 (1984).

[28] Conditions in a tender offer are intended to protect the offeror against contemplated risks and expenses, such as the risk of the sale of the target company's valuable assets. Millions of dollars are typically committed to tender offer acquisition efforts, and if it were somehow federal law that conditions could not be included, or that to invoke them would constitute manipulation, tender offers would not be made.

potential offerors and management of target companies would be subject to liability every time a tender offer is revised or negotiated." JA 40. This would stifle rather than promote market activity and is the antithesis of what Congress intended.

C. There is no basis for interpreting section 14(e) more broadly than section 10(b). Both sections are directed at fraud, which is traditionally understood in the federal securities laws to require deceptive conduct.

Petitioner ultimately appears to recognize that, in light of this Court's decisions, manipulation under the federal securities laws has a well-defined meaning which cannot be extended to cover the conduct at bar. She appears to rely primarily, instead, on the argument that section 14(e) should be interpreted more broadly than section 10(b) because it contains the word "fraudulent" while section 10(b) does not. This concept, though novel, has no support in history, logic or precedent.[29]

In the first place, it ignores the fact that the Williams Act amendments were enacted to extend to tender offers the disclosure regulation already provided for proxy contests and other securities transactions, and not to embark upon a wholly new plan for the regulation of substantive corporate conduct.

Although the legislative history to this end is uncontradicted, Petitioner nevertheless argues that there was no gap in the coverage of the 1934 Act's antifraud provisions and therefore that section 14(e) must have been directed at broader goals. She says, in this regard, that "there was no doubt whatsoever" prior to the Williams Act "that section 10(b) and Rule 10b-5 applied to tender offer disclosures." PB 29. But the fact is that there was a plain gap in the coverage of section

[29] This argument appears to have its genesis in the recent Junewicz article (62 Tex. L. Rev. 1171), and was not made by Petitioner in either the court of appeals or the district court. It appears, moreover, that Junewicz himself is not entirely convinced, for in another recent article which he co-authored, it is concluded that "[a]fter *Santa Fe*, any substantial regulation of corporate responses to attempted acquisitions must be achieved at the state level." Greene and Junewicz, *A Reappraisal of Current Regulation of Mergers and Acquisitions*, 132 U. Pa. L. Rev. 647, 711 (1984).

10(b), relating to the categories of persons who could bring suit under that section, which the new statute, and section 14(e) in particular, was clearly intended to fill.

While *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), had, of course, not been decided at the time the Williams Act was enacted, the principle it ultimately adopted, limiting standing under section 10(b) to actual purchasers and sellers of securities, was generally considered to be the law. *See, e.g., Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). The difference in operative language of the two antifraud provisions — "in connection with the purchase and sale" of securities in section 10(b), and "in connection with any tender offer . . . or any solicitation . . . in opposition to or in favor of such offer" in section 14(e) — was thus critical, for it broadened the class of potential plaintiffs to include those who might have been induced by fraud *not* to tender their shares.[30]

More fundamentally, the thought that section 10(b) was *not* directed at "fraud," as that term has been traditionally understood under the securities laws, is one that dies in the face of years of unbroken precedent, analysis and discussion. Sec-

[30] The Court in *Piper* noted that it "may well be that Congress desired to protect, among others, shareholder-offerees who decided not to tender their stock due to fraudulent misrepresentations by persons opposed to a takeover attempt." 430 U.S. at 38. Similarly, in his dissent in *Piper*, Justice Stevens cited with approval Judge Friendly's statement, in *Electronic Specialty Co. v. Int'l Controls Corp.*, 409 F.2d 937, 940-941 (2d Cir. 1969), that section 14(e)'s "only possible addition to existing case law was its possible impact on standing. . . ." 430 U.S. at 64. *See also Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974):

> To charge violations of Section 14(e) in federal court a private plaintiff need not be a purchaser or a seller of any securities, as he must be to sue under Rule 10b-5. *This is the primary contribution of the Williams Act to the antifraud arsenal;* under Section 14(e) a plaintiff may gain standing if he has been injured by fraudulent activities of others perpetrated in connection with a tender offer, whether or not he has tendered his shares.

489 F.2d at 596 (emphasis added) (footnotes and citations omitted).

tion 10(b) has long been considered by everyone, and particularly by this Court, to be precisely directed at "fraud"; indeed, it is generally considered to be the exemplar of antifraud provisions. Section 14(e) — designed largely to fill a gap in section 10(b)'s coverage — could rationally go no further.

In *Santa Fe* itself, the case in which the requirement of deception was pronounced, the Court referred to section 10(b) as among "the antifraud provisions of the Securities Exchange Act," and to the concept of "Rule 10b-5 fraud." 430 U.S. at 477-478.[31] And in case after case, both before and after *Santa Fe,* identical language and concepts were used.

In *SEC v. National Securities, Inc.,* 393 U.S. 453 (1969), Justice Marshall wrote that "Section 10(b) and Rule 10b-5 together constitute one of the several broad antifraud provisions contained in the securities laws," and he referred to the "broad antifraud purposes of the statute and the rule . . . ." *Id.* at 466-467.[32] In *Superintendent of Ins. of New York v. Bankers Life & Casualty Co.,* 404 U.S. 6 (1971), the Court used the concepts of fraud and deception interchangeably and continually referred to the conduct at issue under section 10(b) as fraud. In *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), the Court, in interpreting section 10(b), pointed out that this was legislation "enacted for the purpose of avoiding frauds . . . ." 406 U.S. at 151.

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[31] *See also* Justice Stevens' concurring opinion in *Santa Fe:* "The facts alleged in the complaint do not constitute 'fraud' within the meaning of Rule 10b-5." 430 U.S. at 481.

[32] Petitioner cites an earlier decision, *SEC v. Capital Gains Research Bureau,* 375 U.S. 180 (1963), for the proposition that fraud under the securities laws includes the situation "where fiduciaries breach their fiduciary duty or there is other egregious conduct." PB 34. But this precise argument was made and rejected in *Santa Fe,* where the Court noted that the references in the *Capital Gains* decision "to fraud in the 'equitable' sense of the term were premised on its recognition that Congress intended the Investment Advisors Act to establish federal fiduciary standards for investment advisers," and that "the fraud that the SEC sought to enjoin in *Capital Gains* was, in fact, a nondisclosure." 430 U.S. at 471 n. 11. The Court in *Capital Gains* also spoke of the "philosophy of full disclosure" as the "fundamental purpose" underlying the securities laws. 375 U.S. at 186.

In *Blue Chip,* the Court said that the statute's wording was "directed at fraud." 421 U.S. at 733. Justice Blackmun's dissenting opinion similarly pointed out that the "question under both Rule 10b-5 and its parent statute, § 10(b), is whether fraud was employed" (*id.* at 768), and that § 10(b) was intended by Congress to be "a broadranging antifraud provision." *Id.* at 770.

In *Foremost-McKesson, Inc. v. Provident Securities Co.,* 423 U.S. 232 (1976), the Court, while dealing with another section (§ 16(b)) of the 1934 Act, noted that section 10(b) was among the "general antifraud statutes" to which an investor might have recourse. 423 U.S. at 255. In *Hochfelder,* Justice Powell, writing for the Court, described the Court's holding as being "that an intent to deceive, manipulate, or defraud is required for civil liability under § 10(b). . . ." 425 U.S. at 191-92 n. 7. And in *Aaron v. SEC,* 446 U.S. 680 (1980), Justice Blackmun, in a concurring and dissenting opinion joined by Justices Brennan and Marshall, characterized section 10(b), along with section 17(a) of the Securities Act of 1933, as "the primary antifraud provisions of the federal securities laws." 446 U.S. at 704.

Chiarella v. United States, 445 U.S. 222 (1980), was a critical decision dealing with section 10(b), and there were sharp divisions within the Court on the precise issue before it. But there was no disagreement on the basic nature of section 10(b) as an antifraud statute. In Justice Powell's decision for the Court, he noted that "Section 10(b) was designed as a catchall clause to prevent fraudulent practices." 445 U.S. at 226. The Chief Justice, in his dissent, pointed out that the "provisions reach *any* person engaged in *any* fraudulent scheme" (*id.* at 240), while Justice Blackmun, also dissenting, expressed the identical view. *Id.* at 250.[33] The thought that section 14(e) is somehow *broader* in concept and scope than a statute that has been so characterized is hardly consistent with these statements.

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[33] Justice Blackmun also said, with reference to *Santa Fe,* that "the securities laws were not intended to replicate the law of fiduciary relations." *Id.* at 248.

The Court had occasion to twice consider section 10(b) in 1983, and again the results, insofar as the present point is concerned, were the same. In *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), Justice Marshall, speaking for the Court, pointed out that section 10(b) was the "established remedy for fraud." 459 U.S. at 381. He described section 10(b) as a "catchall antifraud provision" and wrote of "the broad proscription against fraud in § 10(b)." *Id.* at 382, 386. In *Dirks v. SEC*, 463 U.S. 646, 77 L. Ed. 2d 911 (1983), Justice Powell, writing for the Court, observed that the statutory words "manipulative," "device," and "contrivance" connoted conduct "designed to deceive or defraud investors." *Id.* at 927 n.23.

Thus, the proposition that section 10(b) does not expressly use the word "fraud" and thus does not cover "fraudulent" conduct, and therefore that section 14(e) must have a greater substantive reach, has no support. Section 10(b) has always been considered to be the epitome of an antifraud statute, catching in its net the widest variety of securities fraud. Section 14(e), enacted primarily to fill a perceived gap in section 10(b)'s coverage, had no broader intendment.

Moreover, fraud has a well-defined meaning, both under the securities laws and generally, a meaning in which the concepts of deception, misrepresentation and trickery are central, and which plainly does not encompass breach of contract.[34] There is no indication whatever that Congress, in

[34] For example, in Webster's Third New International Dictionary 904 (1981), fraud is defined as:

> An instance or an act of trickery or deceit esp. when involving misrepresentation: an act of deluding . . . an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another . . . a false representation of a matter of fact by words or conduct, by false or misleading allegations, or by the concealment of what should have been disclosed that deceives or is intended to deceive . . . a means used in trickery: a dishonest strategem or a spurious thing passed off as genuine . . . the quality of being deceitful.

See also, e.g., Webster's New Collegiate Dictionary 453 (1981) (defining fraud as "deceit" or "trickery"—"intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right"); American Heritage Dictionary 523 (1975) ("A deception deliberately practiced in order to secure unfair or unlawful gain"); The New Encyclopedia Britannica, Vol. IV at 287 (1982) ("the deliberate misrepresentation of fact in order to deprive someone of some valuable possession"); The New York Times Everyday Dictionary 274 (1982) ("a trick, trickster, or trickery;" "[f]raudulent" is anything which is "dishonest" or "deceptive").

formulating section 14(e), intended to use this phrase in any other than its traditionally accepted meaning, particularly when it had before it as models the typical antifraud provisions of the federal securities laws.

There is surely no evidence that Congress meant to define fraudulent conduct, as Petitioner would have it, as "all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another," (PB 35) — a formulation which would cover virtually any form of allegedly wrongful conduct. Fraud under section 14(e), in short, means what it has always universally been understood to mean under the federal securities laws.[35]

D. Each of the words in section 14(e) should be accorded its traditional meaning under the federal securities laws.

Petitioner contends that the use of the language "fraudulent, deceptive *or* manipulative acts" in section 14(e) demonstrates that each of these words must have different meanings and apply to different conduct. This is an argument which, in

[35] While Petitioner refers to the mail fraud statute, 18 U.S.C. § 1341 (1983), as providing "analogous support" for her limitless definition of fraud (PB 36), the cases construing fraud under the mail fraud statute are to the contrary. The federal courts have uniformly held that a mere breach of fiduciary duty, absent an element of nondisclosure or misrepresentation, does not constitute mail fraud. *See, e.g., United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), *cert. denied*, 81 L. Ed. 2d 874 (1984) (fraud found only when breach of duty is accompanied by nondisclosure or misrepresentation); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980) (failure to disclose to employer the receipt of kickbacks and a conflict of interest); *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981), *modified in part*, 668 F.2d 352 (5th Cir. 1982) (material nondisclosure required); *Epstein v. United States*, 174 F.2d 754 (6th Cir. 1949) (nondisclosure and personal benefit required). In the case cited by Petitioner, *Post v. United States*, 407 F.2d 319 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969) — a case involving material misrepresentations in connection with the sale of club memberships — the court held that "[m]ere breach of fiduciary obligation does not itself constitute active fraud . . . ." *Id.* at 329.

the first instance, proves far too much, for it would have been equally applicable to section 10(b), which speaks of any "manipulative *or* deceptive device," or to rule 10b-5, which speaks of any device, scheme, *or* artifice to defraud," and of practices which would operate "as a fraud *or* deceit upon any person."

As *Santa Fe* teaches, in holding that manipulation requires deceptive conduct, words connected by disjunctives must still be given their ordinary meaning, and the meaning intended by Congress. "The general purpose," said Justice Holmes, "is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *United States v. Whitridge*, 197 U.S. 135, 143 (1935). Justice Brennan similarly reminded, in *United States v. Naftalin*, 441 U.S. 768 (1979), that matters such as punctuation provide "useful confirmation" only "where they reaffirm conclusions drawn from the words themselves." *Id.* at 774 n.5.

The fact is, as this Court has made clear, that each of the words used traditionally requires the element of deception or the misleading of investors, and does not include conduct, such as breach of contract or of fiduciary obligations, normally regulated by state law. No matter how many separate words, phrases or clauses are used in a statute, this is no warrant for distorting any of them beyond their traditional meaning or beyond what is necessary to accomplish articulated congressional objectives. Indeed, placing the words together suggests a clear congressional intent to regulate similar types of conduct, for "a word is known by the company it keeps," a maxim that is "wisely applied" to "avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle Co.*, 367 U.S. 303, 307 (1961).[36] In section 14(e), the words are used together because they have meanings that are consistent with each other, in that they all traditionally refer to conduct that is deceptive in nature.

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[36] This Court recently reiterated the "'familiar principle of statutory construction that words grouped in a list should be given related meaning.'" *Securities Indus. Ass'n v. Board of Governors*, 82 L. Ed. 2d 158, 167 (1984) (citation omitted).

Similarly, the fact that section 14(e) contains three clauses hardly can change the plain meaning of the statutory terms used in each of the clauses. It seems clear that Congress was using the generic language that had been employed in other antifraud provisions; the statutory language appears to be an amalgam of section 10(b) and Rule 10b-5, and certainly evinces no effort to plough new ground. Indeed, the clauses themselves show no inconsistency or redundance; while the first clause deals directly with the disclosures made by offeror and target, the second deals with the type of manipulative practices in tender offers designed to mislead investors exemplified by the conduct involved in *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970).[37] The third clause is simply the typical mandate given to a regulatory agency to develop rules implementing the statutory policies set forth in the prior clauses, the same type of mandate found in section 10(b), and in section 14(a) of the 1934 Act, dealing with the solicitation of proxies. Such a directive does not expand the scope of a statute nor alter the plain meaning of legislative language.

Significantly, the rules developed pursuant to this mandate do not deal at all with the substantive areas traditionally governed by state law. Rather, to the extent that they go beyond disclosure, they deal with timing and procedural protections designed to insure that the disclosure mandated by the Act can function. *See, e.g.*, 17 C.F.R. § 240.14e-1 (prescribing procedures governing the timing of offers, the timing of increases in the offering price and the timing of purchases or extensions), 17 C.F.R. § 240.14e-2 (regulating the timing of certain target company statements), and 17 C.F.R. § 240.14e-3 (proscribing the classically fraudulent behavior of trading on

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[37] *See supra* n.2. *See also, e.g.*, two other cases cited in Petitioner's brief, *United States v. Brown*, 79 F.2d 321 (2d Cir.), *cert. denied*, 296 U.S. 650 (1935) (bribing brokers to recommend the purchase of stock, so that investors falsely believed that they were receiving advice untainted by personal interest); *Harris v. United States*, 48 F.2d 771 (9th Cir. 1931) (sending false reports of sales of stock to exchanges so as to create false picture of market activity). In these cases, the misleading of investors was central to the fraudulent scheme.

the basis of inside information). These rules reflect the legislative mandate for, as the court of appeals said in *Buffalo Forge*, "Congress's concern was more with the procedural provisions of the Act than with the substantive terms of takeover bids." 717 F.2d at 760.

The comparison with the regulation of proxy contests is an instructive one, since, as we have seen, the Williams Act amendments came about because tender offers had come to rival proxy contests as the mechanism for seeking corporate control.[38] In proxy contests, as with tender offers, federal law mandates and regulates disclosures, and rules formulated by the SEC pursuant to statutory authority regulate certain timing and procedural elements, while state law continues to function in traditional areas of corporate governance.[39]

Indeed, the SEC is explicit that the purpose of its implementing rules under section 14(a) is only to regulate disclosure, and that the Commission "has no authority to pass upon the fairness or the merits or demerits of any such plan; nor to interfere in the consummation of any such plan where full and complete disclosure has been made." Securities Exchange Act Release No. 34-1350, Fed. Sec. L. Rep. (CCH) ¶ 24,083 at 17,611 (August 13, 1937).

In *Golub v. PPD Corp.*, 576 F.2d 759 (8th Cir. 1978), the question was whether a cause of action was stated under section 14(a) after full factual disclosure had been made in the proxy statement. In affirming the district court's grant of summary judgment in favor of the defendant, the court of appeals stated:

> Section 10(b) and Rule 10b-5 and § 14(a) and (e) and Rule 14a-9 are obviously aimed at the same general evils

[38] As Senator Williams stated, the amendments were intended "to provide the same kind of disclosure requirements" as then existed for proxy contests, and were "patterned on the present law and regulations which govern proxy contests." 113 Cong. Rec. at 24665.

[39] *See, e.g., Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906 (Del. Ch. 1980) (enjoining management from amending bylaws to thwart dissident shareholder's intended proxy contest); *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. Sup. 1971) (enjoining management from advancing date of shareholders' meeting to thwart dissident shareholders who were undertaking a proxy contest).

> in the field of corporate ownership, management and finance, are in *pari materia* and should be similarly construed.
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> [I]t was not the purpose of the federal securities laws to provide a federal cause of action for stockholders who have been damaged by mere corporate mismanagement or breach of fiduciary duty by those in charge of the affairs of the corporation. *Controversies in those areas have traditionally been the subject of litigation in the state courts, and federal legislation in the field of securities regulation was not designed to draw such controversies into the federal courts* . . . .

Id. at 764 (emphasis added).

These principles are equally applicable here. Whether viewed from the perspective of legislative history, precedent, the plain meaning of the statutory language, the SEC's interpretive rules, or the overall statutory scheme of the 1934 Act, Petitioner's expansive interpretation of section 14(e) must be rejected.

E. State law has traditionally governed the conduct involved in this case.

Petitioner argues that a federal cause of action must be created because state remedies are "inappropriate, inconsistent and Constitutionally defective." PB 14. This argument, in the first instance, ignores Justice Brennan's observation in *Cort v. Ash*, 422 U.S. 66 (1974), that

> [c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.

Id. at 84.

It is difficult to conceive of an area that is more "traditionally relegated to state law" than breach of contract claims.

Cort, 422 U.S. at 78. Congress may ultimately choose to regulate all contractual claims relating to tender offers, although this seems most unlikely. But any such regulation should not be done by "judicial extension" of antifraud statutes "to 'cover the corporate universe.'" *Santa Fe*, 430 U.S. at 480 (citation omitted).

In fact, state law has traditionally functioned, and functioned effectively, when the courts have found violations of corporate-law principles in the context of tender offers and other contests for corporate control.[40] *See, e.g., Norlin Corp. v. Rooney, Pace, Inc.*, 744 F.2d 255 (2d Cir. 1984) (voting of stock issued by target company as part of defensive strategy during a takeover struggle held to breach New York common law fiduciary principles); *Gearhart Industries Inc. v. Smith International, Inc.*, 741 F.2d 707 (5th Cir. 1984) (remanding for determination of whether acquisition made by target in the face of a hostile tender offer violated state law fiduciary duty and fairness requirements); *San Francisco Real Estate Investors v. Real Estate Investment Trust of America*, 701 F.2d 1000 (1st Cir. 1983) (invalidating target company bylaw that precluded any person from owning more than 9.8% of its outstanding shares as inconsistent with corporation's governing charter); *Klaus v. Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975) (finding violation by target management of fiduciary duty by establishing employees stock option plan and donating substantial stock to it for purposes of diluting strength of offeror's holding); *Podesta v. Calumet Industries, Inc.*, 1978 Fed. Sec. L. Rep. ¶96,433 (N.D. Ill. 1978) (enjoining voting of shares issued by target to resist takeover, in breach of Delaware common law fiduciary principles, by diluting the voting strength of incumbent management's opponents for corporate control); *Consolidated Amusement Co., Ltd. v. Rugoff*, 1978

[40] Despite Petitioner's contention, there need not be, and are not usually, "multiple law suits in various states throughout the nation" to enforce these state-law principles. PB 51. Nor need one deal with the differing laws of each state, as Petitioner suggests. PB 51-52. The law of the corporation's state of incorporation governs its internal affairs, including matters of directors' obligations, breach of fiduciary duty, and self-dealing, and has traditionally provided more than adequate remedies for such conduct.

Fed. Sec. L. Rep. ¶96,584 (S.D.N.Y. 1978) (ordering corporation to repurchase securities sold at an inadequate price in violation of New York common law fiduciary principles); *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204 (8th Cir. 1976) (holding directors' self-issuance of treasury shares to be breach of Minnesota common law fiduciary principles in the context of contest for corporate control); *Gimbel v. Signal Companies, Inc.*, 316 A.2d 599 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del Sup. 1974) (enjoining sale of stock in wholly owned subsidiary for an insufficient price in context of battle for corporate control); *Condec Corporation v. Lunkenheimer Co.*, 230 A.2d 769 (Del. Ch. 1967) (ordering cancellation of shares issued in breach of directors' fiduciary duty to prevent a particular group from obtaining corporate control).

In short, state law has operated precisely in the areas in which it is supposed to operate, and is, in fact, operating in the case at bar, where the Delaware Court of Chancery is determining shareholders' claims of breach of contract and violation of fiduciary duties arising out of this transaction under appropriate state-law principles.[41] There is no reason to believe that creation of parallel federal breach of contract or fiduciary-law principles would prove any more efficacious, or provide any greater consistency. Rather, it could lead only to waste of judicial resources, proliferation of burdens on the participants in tender offers, and the risk of inconsistent results inherent in the consideration by two judicial systems of the identical conduct.

Certainly, the standards that have been suggested to govern the new federal cause of action proposed by Petitioner

[41] As noted (*supra* n. 3), the Delaware court has granted Burlington summary judgment on the claim that it had breached the tender offer contract. However, it denied summary judgment on the claim that Burlington had participated with El Paso directors in a breach of these directors' fiduciary duties, so that this claim will presumably go to trial. It is noteworthy, in this regard, that we do not have the multiple lawsuits in various states that petitioner warns against, but rather one action in Delaware that should resolve all of the substantive questions at issue. No case has been brought in any other state. As petitioner says, "Delaware will now assert jurisdiction and the result of any decision therein would be *res judicata* across the country." PB 56.

would bring no new clarity to the field, and offer no workable guidelines for distinguishing permissible from prohibited conduct. Petitioner's proposed test, for example, suggests that no conduct which impacts in any way on shareholders' opportunity to consider a tender offer should be permitted.[42] *See, e.g.*, PB 47 ("whether or not the act improperly interfered with the choices available to the target company shareholders, including the freely functioning marketplace"). Under this definition, a merger agreement with a white knight on terms which directors reasonably believe to be more favorable than the tender offer would be forbidden; even negotiations seeking alternative transactions might be interdicted.

Other suggested tests are no more helpful. *See, e.g.*, Junewicz, *The Appropriate Limits of Section 14(e) of the Securities Exchange Act of 1934*, 62 Tex. L. Rev. 1171, 1201 (1984) ("[t]he insidiousness of the wrongdoer's purpose differentiates fraud from simple breaches of fiduciary duty, which are actionable primarily under state law"); *Mobil*, 669 F.2d at 374 ("manipulation is an affecting of the market for, or price of, securities by *artificial* means," emphasis by the court);[43] *Data Probe Acquisition Corp. v. Datatab, Inc.*, 568 F. Supp. 1538, 1559 (S.D.N.Y.), *rev'd*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1326 (1984) (manipulation is "restricted to those acts that unduly obstruct the exercise of informed shareholder choice").[44]

Tests of this nature add nothing of substance to the applicable state-law principles and are an open invitation to

[42] See Easterbrook & Fischel, *The Proper Role of A Target's Management In Responding To A Tender Offer*, 94 Harv. L. Rev. 1161 (1981).

[43] As the court of appeals observed in the present case, the test suggested in *Mobil* "would transform all decisions by bidders or by target management that affect a tender offer contest into 'artificial' influences." JA 57.

[44] The district court in *Data Probe* allowed that this test might be "difficult . . . to apply in the real world," but concluded that unless the Williams Act were so extended, shareholder rights would be "possibly rendered meaningless because of lax state standards or procedures." 568 F. Supp. at 1559. We submit that this Court should not assume that state standards or procedures will be "lax," nor have they been shown to be so.

judicial legislation.[45] They will not aid, in practice, in assuring that shareholders have the opportunity to consider tender offers, and are likely to deter offers because of the additional uncertainty they would create. Justice White in *Santa Fe* warned against just this kind of interference with state corporate law, and spoke of the impossibility of drawing any rational lines once federal law, unguided by congressionally established standards, entered the state domain. 430 U.S. at 479. This admonition has singular force here.

Petitioner's supposedly *MITE*-based[46] claim that traditional state regulation of corporate conduct is somehow constitutionally precluded merits only brief consideration. In *MITE*, this Court struck down the Illinois Takeover Statute because it imposed burdens on tender offers which conflicted directly with the Williams Act and its rules. 457 U.S. at 640. But state court adjudication of traditional corporate-law or contract claims is not tender offer regulation, and creates no burdens on tender offers, nor is there anything remotely inconsistent between these state-law principles and any provisions of the Williams Act. Indeed, to the extent that petitioner would deny offerors ordinary state-law freedom of contract, this would ultimately conflict with the policy, articulated in *MITE*, of encouraging tender offers to be made.

The type of sharp conflict necessary to displace state law in the area of corporate governance is demonstrated by *Burks v. Lasker*, 441 U.S. 471 (1979). That case involved the Investment Company and Investment Advisors Acts of 1940, statutes establishing a far more pervasive federal regulatory scheme than the Williams Act. The Court nonetheless held that state law, and not federal law, governed the important question of when a corporation's directors could terminate a derivative suit under these statutes. Corporation law, said Justice Brennan, was not an area where the federal courts were authorized "to fashion a complete body of federal law." 441 U.S. at 477.

[45] *See generally* Prentice, *Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized To Overcome The Business Judgment Rule?*, 3 J. Corp. L. 337, 356 (1983), noting that the test suggested in *Mobil* "funnels the inquiry right back" to the applicable state law standards.

[46] *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

Rather, "it is state law which is the font of corporate directors' powers." *Id.* at 478. Moreover, "Congress has never indicated that the entire corpus of state corporation law is to be replaced" even when the cause of action is based upon a federal statute. *Id.* While " 'specific aberrant or hostile state rules' " will not be applied, federal courts are not "to fashion an entire body of federal corporate law out of whole cloth." *Id.* at 479, 480.

Petitioner in the present case makes no effort to show the kind of inconsistency required by *Burks*, or any inconsistency at all, between state contract law and the Williams Act. Instead, she maintains, without citation to Congress or court, that the "purpose of the Williams Act was to ensure uniform treatment and a rapid resolution of all tender offer disputes." PB 53. Congress is free, of course, to establish such a regulatory scheme when it considers the mass of materials before it with respect to proposed legislative changes in the Williams Act, although we seriously doubt that a federal law of tender offer contracts will be part of any program it may choose to adopt. But that no such regulation presently exists is beyond any possible dispute.

POINT III

THERE ARE NO POLICY REASONS TO CREATE THE CAUSE OF ACTION SUGGESTED BY PETITIONER

In order to create the cause of action sought by petitioner, the Court would, in the first instance, have to overturn the principles which it has continually articulated in recent securities cases. It would have to define and interpret language (*i.e.*, fraudulent and manipulative) in ways it has never been interpreted under the securities laws. It would have to intrude deeply into "established state policies of corporate regulation," causing inevitable conflict and friction. *Santa Fe*, 430 U.S. at 479. And it would have to impute an intent to Congress which hardly can be gleaned, even in fragments, from the volumes of legislative materials relevant to the Williams Act.

There is presently much debate in the scholarly, legal, business and regulatory communities as to the effect of tender

offers on our economy, the appropriate role of target company management in responding to them, and the desirability of various reforms which might substantially alter the tender offer process. Some commentators believe that tender offers are harmful to the country's long-term economic interests, since they divert corporate and financial resources from more productive pursuits. Others believe that tender offers operate to check inefficient management and promote synergistic savings, and that target company managements have been improperly permitted to obstruct them, often for their own personal ends. The views expressed and the suggestions made by professors, businessmen, economists, lawyers and regulators, and the literally reams of material written on the subject, cover the spectrum between these poles.[47] There is, for certain, no conceivable consensus as to what practices should be encouraged, and which conduct should be curtailed.

All of this is now before the appropriate congressional committees, along with various detailed legislative proposals for the amendment of the Williams Act, and Congress will soon have some difficult choices to make. But this is the nature of the legislative function, and the process will hardly be aided by judicially replacing state causes of action with a federal one, particularly where Congress has provided no guidelines or standards to chart the way. Congress may opt for wide-ranging federal regulation; it may choose to prohibit some tactics that are used in tender offers and to allow others; or it may choose to leave things pretty much as they are. But the choice is for it, and not the courts, to make.

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[47] For example, the report of recommendations of the SEC Advisory Committee on Tender Offers, which includes differing views of various members of the Committee, alone runs to over 170 pages. Scholarly comment in the area is seemingly inexhaustible and to catalogue it would, we believe, serve no productive purpose. The secondary materials thought pertinent by the court of appeals in the present case are set forth at JA 57.

POINT IV

UNDER ANY DEFINITION OF CONDUCT PROSCRIBED BY SECTION 14(e) RESPONDENTS' CONDUCT WAS LAWFUL

Even if a more expansive definition of section 14(e) were adopted, it could not possibly cover the conduct at issue here. The claim here is for the "wrongful termination" of a tender offer (PB 5) — a supposed violation of the tender offer contract — and no court under any definition has held that breach of contract constitutes "fraud" or "manipulation."

Indeed, the facts alleged here could not possibly come within the reasoning of *Mobil*, the only case that has departed from the requirement of deception under the antifraud provisions of the federal securities laws. There was no attempt to affect the market or price of securities by artificial means or by any means whatever. There was no attempt to alter any "delicate balance between target company management and the bidder" (PB 12); the complaint, rather, is of a fully-disclosed *agreement* between target and bidder, which is how most acquisitions occur and many hostile tender offers are ultimately resolved. There was no "crown jewel" asset option to render the target company virtually useless to any hostile bidder; any other bidder for El Paso would have found the company's assets intact. The stock option involved was at the tender offer price, not at a substantially lower price, as in *Mobil*, and was for only a small portion of the target shares.[48]

Moreover, the termination of the initial offer had nothing to do with the bidding process for El Paso stock, nor did it operate to defeat any competing bidder since no competitive offer had emerged. Indeed, the agreement can be said to have facilitated competitive bidding for El Paso, since it provided an additional 20 business days — the Williams Act time period for the new offer — in which a competing bid could have been made. All that happened is that Burlington and El Paso

[48] Compare *Data Probe*, where a 200% stock option made it impossible for a hostile offeror to prevail. Even the district court in *Data Probe*, which had found this conduct to be manipulative, opined that options of the dimension involved in the present case should be permitted as "consistent with Williams Act objectives." 568 F. Supp. at 1560. The court noted that the SEC Advisory Committee had "recommended with virtual unanimity" that companies be permitted to offer such options in tender offer contests. *Id.* at 1561.

compromised their differences after arm's-length negotiations by a typical acquisition agreement providing substantial benefits to all El Paso shareholders — including important protections against any subsequent merger at an inadequate price — and which ultimately resulted in the acquisition of all El Paso shares at premium prices.[49]

This ordinary corporate activity is not "fraud" by any standard, and no court or commentator has remotely suggested that it is. There is, we submit, no warrant for judicially extending section 14(e) beyond what has generally been considered to be the boundaries of the federal securities laws. But if it is to be extended, a breach of contract claim is, to borrow Justice Rehnquist's phrase in *Blue Chip*, a most unlikely candidate for any such expansion. 421 U.S. at 751. We respectfully submit that the decisions of the court of appeals and the district court were clearly correct in this case and that the judgment should be affirmed.[50]

[49] The portion of petitioner's stock that was purchased in the tender offer was reduced by proration because, as noted at p. 5, *supra*, the agreement gave all El Paso shareholders, including the holders of the 25,000,000 shares who had not tendered their shares in the initial offer at management's urging, an opportunity to tender. Not to have given all El Paso's shareholders the opportunity to tender pursuant to the new offer, after the market had established that the consideration in the first offer was fair, might, itself, have constituted a breach of fiduciary obligations.

Ultimately, Burlington acquired, in a merger, all remaining shares for a consideration having the same value as the tender offer price.

[50] The courts below also properly dismissed petitioner's "disclosure" claim. Petitioner alleges that Burlington should have disclosed, in its January offer, employment contracts that El Paso had entered into with certain of its officers. However, there is indisputably no causal nexus between petitioner's claimed damage—allegedly caused by the termination of the December offer—and any failure to disclose in the later, January offer. Petitioner's claim is not that she was induced by misrepresentations or omissions to tender her shares into the January offer, but rather that, because of proration, not all of her shares were purchased in that offer. Moreover, there is no requirement that Burlington disclose the El Paso employment contracts. It is undisputed that El Paso did in fact disclose these contracts in its Schedule 14D-9 filed with the SEC (and mailed to El Paso shareholders) on December 23, 1982. JA 192-216. That public filing resulted in a Wall Street Journal article concerning the contracts on December 30, 1982. JA 223-226. Thus, the material which Petitioner claims was hidden from the El Paso shareholders in the January offer was public knowledge 12 days before the offer was made.

CONCLUSION

For the above-stated reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

A-1

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

PETER GILBERT and WILLIAM STEINER,
Plaintiffs,

v.

THE EL PASO COMPANY and
BURLINGTON NORTHERN, INC., et al.,
Defendants.

HERBERT BREITMAN, as sole Trustee of ED ROSENTHAL NECKWEAR, INC. PROFIT SHARING PLAN, and all other parties similarly situated and circumstanced,
Plaintiff,

v.

BURLINGTON NORTHERN, INC., et al.,
Defendants.

Consolidated Civil Action Numbers 7075 and 7079

Civil Action Number 7078

SUBMITTED: October 17, 1984
DECIDED: November 27, 1984

Defendant Burlington's Motion for Summary Judgment. Granted in Part. Denied in Part.

William Prickett, Esquire of Prickett, Jones, Elliott, Kristol and Schnee, Wilmington, Delaware; Abraham G. Levin, Esquire and Martin A. Coleman, Esquire of Rubin Baum Levin Constant & Friedman, New York, New York; Mordecai Rosenfeld, Esquire of New York, New York, Attorneys for Plaintiffs.

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WALSH, Vice Chancellor

This is a class action arising out of Burlington Northern Inc.'s ("Burlington") takeover of the El Paso Company ("El Paso") in early 1983. The plaintiffs are those shareholders who tendered into Burlington's December 21, 1982, tender offer, which Burlington later terminated, and subsequently were subject to proration in the second tender offer made in January, 1983. Plaintiffs' complaint contains a number of allegations against El Paso and Burlington[1] concerning the termination of the first tender offer and the terms of the second tender offer. It is alleged that both corporate defendants and their respective directors manipulated the corporate machinery for entrenchment purposes, conspired to breach fiduciary duties and interfered with business relationships. Burlington is separately charged with breach of contract and equitable estoppel.

Burlington has moved to dismiss the complaint, or alternatively, for summary judgment on all counts asserting that (1) it owed no fiduciary duty to the El Paso shareholders, (2) it had an unqualified right to terminate the December tender offer upon the occurrence of events specified in that tender offer, and (3) it could not be held liable for conspiracy merely because it conducted arm's-length negotiations with El Paso management to obtain the lowest available price for El Paso stock.

In the context of a motion to dismiss, or for summary judgment, Burlington must demonstrate that the plaintiffs could not prevail under any state of facts which could be proved in

[1] There are two Burlington defendants: Burlington Northern, Inc. and its subsidiary, R-H Holdings Corporation, apparently organized for the purpose of effecting the El Paso takeover. For present purposes, there is no basis to distinguish between them and they will be referred to collectively as "Burlington."

support of their claim. *Penn Mart Realty Company v. Becker*, Del. Ch., 298 A.2d 349 (1972), or that no material question of fact exists and that Burlington is entitled to relief as a matter of law. In addition, all factual inferences must be resolved in favor of the plaintiffs as the nonmovants. *Judah v. Delaware Trust Co.*, Del. Supr., 378 A.2d 624, 632 (1977). So viewed, the following factual pattern emerges. On December 21, 1982, Burlington made a tender offer for 25,100,000, or 51% of the shares of El Paso at $24 a share, a 25% premium above market value. The stated terms of the offer provided for withdrawal of the tendered shares through January 12, 1983, and included a number of conditions, the occurrence of which, at Burlington's option, might terminate its obligation to purchase the tendered shares. These conditions, or "outs," included (1) litigation challenging the tender offer, (2) a change, or proposed change, in the business, assets, or properties of El Paso, (3) the issuance of, or a proposal to issue, additional shares of El Paso stock, (4) the adoption of, or a proposal to adopt, any amendment to El Paso's charter or bylaws, and (5) a definitive agreement for a merger or other business combination between El Paso and Burlington.

The conditions engrafted on Burlington's offer anticipated the type of defensive activities a target company often takes in opposing a hostile takeover. Thus, it is not surprising that each of these conditions actually occurred in the three weeks following Burlington's initial tender offer. The El Paso board of directors responded aggressively to Burlington's announcement. It advised its shareholders that the $24 dollar offering price was inadequate and initiated actions to discourage Burlington's overture, including litigation challenging the offer; the announcement of plans to issue a preferred stock dividend; proposed bylaw amendments and negotiations to sell certain of its assets. In addition, the Attorney General of Texas, apparently at the urging of El Paso, sought to enjoin the offer on antitrust grounds. These measures failed to stem the interest of El Paso's shareholders who by January 10, 1983, had tendered 25,433,166 shares in complete satisfaction of the tender offer.

On January 12, the tendering shareholders no longer would have been able to withdraw their shares, and Burlington would have been able to purchase those shares and gain control of El Paso.

In the meanwhile, however, the hostile takeover turned friendly as the El Paso Board reached an agreement with Burlington. On January 10, 1983, the former antagonists announced the terms of an agreement under which (1) Burlington agreed to revoke the December tender offer, (2) Burlington would commence a new tender offer for 21 million shares of El Paso common, with El Paso itself selling Burlington the additional 4,166,667 shares needed to achieve control, and (3) certain El Paso directors were granted "golden parachutes," *i.e.*, employment benefits, in the event of a takeover. Because the revised offer permitted El Paso and certain of its directors to sell their shares directly to Burlington, it had the effect of denying certain shareholders the opportunity to participate in the second tender offer, which was oversubscribed with more than 40 million shares tendered. Thus, although the offering price of $24 per share remained unchanged, plaintiffs and the class members were unable to realize the premium for all the shares already deposited under the first tender offer.

Even though Burlington eventually acquired all outstanding shares of El Paso in a second stage offer at a later date and at the same $24 price, the January tender offer contained no requirement concerning the time of purchase or price of shares to be acquired in the second tier. Prior to that time, the plaintiff class claims to have sold their shares on the open market at a substantial discount under the tender offer price.

Burlington's motion for summary judgment, while conceding plaintiffs' view of the record, questions the legal validity of the alternative grounds for recovery. In essence, it contends that as a tender offeror, pursuing its own economic interests, it owed the plaintiff class no contractual or fiduciary duty. To the extent that its role as an offeror is subject to federal law requirements of disclosure and non-manipulation Burlington rests upon a determination in companion federal litigation

which absolved it of federal securities law violations *vis-a-vis* the plaintiff class.[2] It is therefore necessary to test separately the merit of plaintiffs' claims arising under State law.

I

Plaintiffs' primary grievance is that Burlington breached its contractual obligation to complete its December tender offer. The parties agree that New Jersey law controls this question because the depository arrangement under which shares were to be tendered took place in that State. There are, however, no unique provisions of New Jersey statutory or decisional law which suggest a result at variance with general considerations of contract law.

A tender offer results in formation of a contract where it invites acceptance through the performance of a specific act, rather than through an exchange of promises. 1 Williston, Contracts §§ 31, 76 (3d ed. 1957); 1 Corbin Contracts § 62; Restatement of Contracts (Second) § 30. The specific response sought through a tender offer to purchase securities at a stipulated price is the deposit of shares into the depository during a designated period of time. But the offeror is "master of his offer" and may attach conditions which limit his obligation in full or in part. *Kroeze v. Chloride Group Ltd*, 5th Cir., 572 F.2d 1099, 1105 (1975); *Lowenschuss v. Kane*, 2d Cir., 520 F.2d 255 (1975). Where the specified condition is a condition subsequent, it serves to relieve the offeror of the obligation to proceed upon the happening of a future event, even in the face of an act of acceptance, if the condition subsequent occurs within the time reserved.

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[2] In *Schreiber v. Burlington Northern, Inc.*, D. Del., 568 F. Supp. 197 (1983); *aff'd.* 3a Cir., 731 F.2d 163 (1984), Chief Judge Latchum determined that the conduct of Burlington and El Paso in structuring the terms of the January tender offer did not constitute manipulation or actionable nondisclosure within the meaning of § 14(e) of the Williams Act (15 U.S.C. § 78n(e)). In the absence of underlying federal jurisdiction, the Court declined to rule upon the pendant state claims which mirror the claims in this case.

Plaintiffs acknowledge that many, if not all of the "conditions out" specified in Burlington's December tender offer occurred. Litigation both in Delaware and in Texas was in progress when the December offer was terminated and El Paso's efforts to amend its bylaws and sell certain of its assets are not disputed. Plaintiffs rely, however, on Burlington's alleged failure to exercise its option to terminate the tender offer in good faith. Implicit in every contractual relationship, it is argued, is the obligation of a party who seeks to invoke a condition relieving that party of proceeding with an undertaking to do so with honesty and fair dealing, particularly where the opposing party has acted in reliance upon the outstanding posture of the offer. In effect, plaintiffs seek to impose a test of subjective good faith rather than the objective search for the occurrence of specified conditions.

An implied covenant of good faith and fair dealings is engrafted upon every contract. 5 Williston, Contracts § 670 (3rd Ed. 1969); *Onderdank v. Presbyterian Homes of N.J.*, N.J. Supr., 425 A.2d 1057, 1062-63 (1981). This requirement extends to the enforcement of conditions and may preclude a party from avoidance of a contractual undertaking through invoking a condition which occurred by reason of his own actions. *Association Group Life, Inc. v. Catholic War Veterans*, N.J. Supr., 293 A.2d 382, 384 (1972). Similarly, if one party is given discretion in determining whether the condition in fact has occurred that party must use good faith in making that determination.

While the result of Burlington's termination of its December tender offer might appear unfair to those shareholders who tendered their shares in response to the announcement, it cannot be said that they were misled concerning Burlington's right to do so. The offer expressly provided that Burlington "shall not be required to accept for payment or pay for tendered Shares, or may terminate or amend the Offer" if any of the specified conditions occur, and Burlington, in its "sole judgment," decides that proceeding with the tender offer is "inadvisable." This language place tendering shareholders on

clear notice that upon the occurrence of any condition, Burlington reserved for itself the choice of proceeding with the tender offer or invoking the condition and terminating the offer.

The application of a good faith or subjective standard to the enforcement of conditions is appropriate where either the definition or the declaration of occurrence of the condition is left to the sole discretion of the invoking party. *Onderdank, supra.* Where, as here, the conditions are expressed, the motivation of the invoking party is, in the absence of fraud, of little relevance. Certainly, a party to a contractual undertaking is free to pursue its economic interests through the application of conditions intended to limit the cost of proceeding. Thus, even if Burlington's real motivation was, as plaintiffs urge, to secure a definitive agreement of merger, on terms more beneficial to it, as an alternative to its December tender offer, the tender offer expressly so contemplated. Although the terms of that later agreement may be subject to question, as noted hereafter, Burlington's right to pursue that course does not infringe upon plaintiffs' contractual rights under the tender offer.

II

Next to be considered is plaintiffs' claim of breach of fiduciary duty. Although Burlington owned only 1% of El Paso's shares when it commenced its takeover efforts, plaintiffs maintain that once Burlington achieved the initial goal of its December tender offer, that is, once it became aware that there were sufficient shares in the depository to constitute control, it wore the mantle of fiduciary responsibility. Plaintiffs argue that Burlington used "the power to control El Paso" in fashioning a friendly agreement with El Paso's management, a consequence of which was the squeezing out of the plaintiff class from the second tender offer. In any event, it is argued, there are material issues of fact which preclude a determination of fiduciary obligation.

Generally, a shareholder who owns less than 50% of a corporation's outstanding stock does not, without more, become a controlling shareholder of that corporation, with a con-

comitant fiduciary status. *Osofsky v. J. Ray McDermott & Co., Inc.*, 2d Cir., 725 F.2d 1057 (1984). For controlling stock ownership to exist in the absence of a numerical majority there must be domination by a minority shareholder through actual exercise of direction over corporate conduct. *Kaplan v. Centex Corporation*, Del. Ch., 284 A.2d 119 (1971).

As the party resisting summary judgment plaintiffs are entitled to the inference that Burlington, by virtue of its depository achievement, assumed a superior bargaining position in dealing with El Paso's management. To that extent it may be said that Burlington used its *right* to future control as leverage to fashion a merger agreement more to its benefit. But its status, however enhanced, remained that of an outsider, free to bargain but not to dictate terms to El Paso's management. Burlington's lack of actual control is illustrated by its frustration in attempting to block El Paso's attempt to sell certain of its assets, the so-called "crown jewels." Not only was Burlington unsuccessful in blocking El Paso's efforts to solicit offers for these assets, but also El Paso refused to permit Burlington to participate in the bidding for them.

Plaintiffs' contention that Burlington occupied a fiduciary role because of its potential for control is subject to the same infirmity as its contract argument. Because of the conditional nature of the tender offer, no fixed legal relationship arose as long as Burlington was entitled to withdraw its tender offer. While, as previously noted, certain claims, actionable under federal securities law, may arise from the manner and method of a tender offer, Burlington has been absolved of misconduct in that respect. State law claims of breach of contract and breach of fiduciary relationship must subsist on the actuality of a specific legal relationship, not in its potential.

In sum, I conclude that Burlington, as a hostile tender offeror, not exercising actual control over the corporate affairs of its target, El Paso, owed no direct duty of a fiduciary nature to El Paso's shareholders.

III

I turn now to the crucial and dispositive issue—the conspiracy claim. Plaintiffs contend that, even in the absence of a direct fiduciary obligation, Burlington used its potential for control to extract from Burlington conditions more favorable to it than the December tender offer and in the process caused El Paso's directors to breach their fiduciary duty to El Paso's shareholders, including plaintiffs. The focus thus shifts to El Paso's conduct during the period between the depository achievement and the announcement of the merger agreement. It is plaintiffs' position that if El Paso's directors, in the face of inevitable defeat, abandoned their resistance in order to fashion a better deal for themselves at the expense of certain of its shareholders who had already tendered into the December offer, such conduct would constitute a breach of fiduciary duty. And, the argument runs, if Burlington was a party to the agreement it may share liability under the theory of civil conspiracy.

Although the record is silent on the events which preceded Burlington's January 10, announcement that it had reached an amicable agreement with El Paso's management, at least two scenarios, both favorable to plaintiffs, may be inferred. Under the first it may be assumed that Burlington, when it became aware that sufficient shares had been tendered into the depository to constitute control, approached El Paso's management, suggested the inevitable result and proceeded to dictate terms of a friendly takeover. These terms which included the termination of all litigation, the cessation of efforts to sell assets and the retention of the charter and the bylaw structure were achieved without increasing the December tender offer price. Burlington presumably was aware that certain terms requested by El Paso's management, the sale of treasury shares and the opportunity for directors to tender into the revised offer, would result in certain of El Paso's own shareholders being squeezed out of the second offer. The other chain of events portrays El Paso's management initiating takeover discussions after it became aware that Burlington had achieved the potential for control through its depository. Because of Burlington's superior

bargaining position the result is the same and the detriment to plaintiffs equally evident.

Plaintiffs contend that regardless of which of the defendants initiated the discussions which led to the friendly tender offer, Burlington's participation, with presumed knowledge of El Paso's fiduciary duty to protect the interests of its shareholders, and its agreement to terms which, *inter alia*, narrowed the pool of shares which could be tendered into the second offer, constituted civil conspiracy. Burlington replies that because its primary obligation is to its own shareholders, its effort to obtain the best price through negotiations with El Paso was in furtherance of its own corporate responsibility.

It is well settled that a third party who knowingly participates in the breach of a fiduciary's duty becomes liable to the beneficiaries of the trust relationship. *Jackson v. Smith*, 254 U.S. 586, 589 (1921); *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, Del. Supr., 372 A.2d 168, 170 (1976); *Penn Mart Realty Company v. Becker*, Del. Ch., 298 A.2d 349, 351 (1972); *Scott on Trusts*, § 326.5 (3rd Ed. 1967). In *Penn Mart*, this Court set forth the three elements which must be asserted in support of a claim of civil conspiracy: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty and (3) knowing participation in that breach by the party not in direct fiduciary relationship. A fourth element, the allegation of damages resulting from the action of the conspiracy parties, also is required. *Weinberger v. UOP, Inc.*, Del. Ch., 426 A.2d 1333, 1348 (1981), *rev'd on other grounds*, Del. Supr., 457 A.2d 701 (1983). *Weinberger* notes that while the essence of a criminal conspiracy is the agreement, the essence of civil conspiracy is damages.

While El Paso is not a party to the present motion and has not participated in the briefing, it may be assumed, at this juncture at least, that it owed a fiduciary duty to the plaintiff class not to prejudice their interests in the December tender offer. This does not mean that El Paso's management was not free to attempt to persuade its shareholders not to tender their shares or to engage in other defensive tactics, but El Paso could

not interfere with the alienability of the tendered shares by pursuing its own interests. Since Burlington had already achieved a control level of shares in the December depository, the inclusion in the friendly agreement of a revised tender for fewer shares at the same price because of the direct purchase of shares from El Paso's treasury and from certain of El Paso directors who had not tendered into the December offer hardly advanced the interests of El Paso's shareholders, particularly those who had already tendered their shares into the December offer. But the agreement which led to the January tender offer accommodated Burlington by permitting it to purchase 4,166,667 newly issued shares of El Paso stock directly from El Paso. The $100 million resulting payment by Burlington to El Paso would, of course, redound to its benefit once control was secured. Because the purchase of the treasury shares was clearly to its own benefit, it is arguable whether Burlington may be said to have conspired with El Paso to acquire them. But because this valuable concession, which greatly impacted upon El Paso's shareholders who had already tendered their shares; was extracted in exchange for other terms which clearly benefitted only El Paso's management and not its shareholders, it cannot be said, as a matter of law, that Burlington was merely engaged in arm's-length negotiations. Clearly, the purchase of approximately 556,000 shares from El Paso's directors, who had disdained tendering into the December offer, falls within the ambit of a claim of civil conspiracy. By agreeing to purchase them from El Paso's directors, Burlington is chargeable with knowledge that El Paso's directors were preferring their interests to certain of its shareholders who had already tendered. In effect, Burlington in permitting displacement of shares already tendered with shares to be tendered by El Paso's directors became a party to subjecting certain of El Paso's shareholders to extensive proration. To the extent those shareholders suffered damages, an issue not contested by Burlington in the context of its motion for summary judgment, the elements of a civil conspiracy appear complete.

Burlington attempts to refute the conspiracy claim by reliance upon *Weinberger v. United Financial Corp. of Califor-*

nia, Del. Ch., C.A. 5915, V.C. Hartnett (October 13, 1983), in which this Court refused to impose liability upon an offeror in a tender offer who simply pursued arm's-length negotiations with a target company in an effort to obtain the best price it could. *Weinberger*, however, does not stand for the proposition that pursuit to the best available price in negotiations with opposing management can be undertaken without regard to the target management's fiduciary obligations to its shareholders. In *Weinberger* the Court noted that "no fact has been adduced to indicate that National aided and abetted the United Financial board in any way." Slip at 29. Obviously, an offeror who does participate in a target board's breach of fiduciary duty, cannot be said to be conducting arm's-length negotiations. Furthermore, as indicated in *Penn Mart, supra*, the offeror's fiduciary duty to its own shareholders to obtain the best price for stock purchased, does not necessarily obviate the offeror's duty to refrain from participating in the target management's breach of fiduciary duty. Thus, although an offeror may attempt to obtain the lowest possible price for stock through arm's-length negotiations with the target's board, it may not knowingly participate in the target board's breach of fiduciary duty by extracting terms which require the opposite party to prefer its interests at the expense of its shareholders.

It is clear that Burlington's motion for summary judgment must be denied as to the conspiracy claim. Viewing all inferences in a light most favorable to the plaintiffs, a number of triable issues of fact exist concerning the negotiations which led to the agreement announced on January 10, 1983, and its detrimental effect on the plaintiff class. In short, if El Paso's board breached its fiduciary duty to its shareholders, with Burlington's knowing participation, and damages are shown, then the plaintiffs can prevail.

It should be emphasized, however, that the denial of summary judgment as to the conspiracy claim is based upon Burlington's conduct in fashioning the terms of the January tender offer. Its liability, if any, to plaintiffs does not arise contractually, or through a direct fiduciary relationship, in the

context of the formulation or termination of the December tender offer. This distinction, while subtle, is a necessary one if Burlington's role as an alleged co-conspirator is to remain actionable.

IV

Lastly, the plaintiffs also allege tortious interference with contractual business relations against both El Paso and Burlington. This claim is quickly addressed. Because Burlington was a party to the contract representing the first tender offer, the plaintiffs plainly have no cause of action against Burlington for tortious interference with that contract. *Wilmington Trust Co. v. Clark*, Md. Ct. App., 424 A.2d 744, 754 (1981); *Battista v. Lebanon Trotting Ass'n*, 6th Cir., 538 F.2d 111 (1976). Accordingly, the defendant's motion to dismiss with respect to this count is granted.

V

In summary, Burlington's motion for summary judgment as to Counts I, II, III and VI is granted. The claim of equitable estoppel (Count IV) has not been briefed by plaintiffs and is apparently abandoned. As to the conspiracy claim, Count V, the motion for summary judgment is denied.